

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: RULE WAIVERS	DOCKET NO. RMU-00-1
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**ORDER TERMINATING RULE MAKING PROCEEDING
AND COMMENCING NEW RULE MAKING**

(Issued July 31, 2000)

On January 18, 2000, the Utilities Board (Board) issued an order commencing a rule making to receive public comment on the rescission of the Board's waiver rule, and the adoption of new waiver rules. The Notice of Intended Action was published in the Iowa Administrative Bulletin, Vol. XXII, No. 16 (02/09/00) p. 1240, as ARC 9664A.

After the Board issued its proposed rules, the legislature passed 2000 Iowa Acts House File 2206, and the governor signed the bill. The bill sets statutory criteria for granting waivers that are different from those in the Board's proposed rules. Given the level of activity in the legislature, the changed criteria, and the request for additional opportunity to comment, the Board deems it best to terminate this rule making and initiate a new one with a redrafted proposed rule. Since the Board already has a fully functioning waiver rule, the delay should not present a problem.

Pursuant to the authority of Iowa Code § 17A.4(1)"b" (1999), the Board terminates the rule making initiated by Board order on January 18, 2000, and published as ARC 9664A.

The Board is hereby initiating a new waiver rule making which will also be identified as Docket No. RMU-00-1, In Re: Rule Waivers. Pursuant to the authority of Iowa Code §§ 17A.4, 474.5, 476.1, and 476.2(1) (1999), and 2000 Iowa Acts House File 2206, the Board proposes to adopt the rules attached hereto and incorporated by reference. These rules rescind the former 199 IAC 1.3 and adopt a new 199 IAC 1.3; and adopt a new subrule 199 IAC 2.2(17). The reasons for proposing this amendment are set forth in the attached notice of intended action.

IT IS THEREFORE ORDERED:

1. The rule making initiated in the Notice of Intended Action published in the Iowa Administrative Bulletin, Vol. XXII, No. 16 (02/09/00) p. 1240, as ARC 9664A, is terminated.
2. A new rule making proceeding, identified as Docket No. RMU-00-1, In Re: Rule Waivers, is commenced for purposes of receiving comments upon the proposed rules attached to this order.

3. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice of termination and notice of intended action in the form attached to this order.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr. /s/ Diane Munns
Executive Secretary

Dated at Des Moines, Iowa, this 31st day of July, 2000.

UTILITIES DIVISION [199]

Notice of Termination and Notice of Intended Action

Pursuant to Iowa Code section 17A.4(1)"b," the Utilities Board (Board) gives notice that on July 31, 2000, the Board issued an order in Docket No. RMU-00-1, In re: Rule Waivers, "Order Terminating Rule Making Proceeding and Commencing New Rule Making."

On January 18, 2000, the Board issued an order commencing a rule making to receive public comment on the rescission of the Board's waiver rule, and the adoption of new waiver rules. The Notice of Intended Action was published in the Iowa Administrative Bulletin, Vol. XXII, No. 16 (02/09/00), p. 1240, as ARC 9664A. The proposed new waiver rules contained criteria for granting waivers based on Governor Vilsack's Executive Order 11. The majority of those who commented based their written comments on the criteria as proposed.

After the Board issued its proposed rules, bills setting different criteria for waivers and rescinding Executive Order 11 were introduced in the legislature. In its written comments, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) stated it was not taking those developments into account when providing comments. Consumer Advocate requested additional opportunity to comment prior to adoption of the final rules.

The legislature passed 2000 Iowa Acts House File 2206, and the Governor signed the bill. The bill sets statutory criteria for granting waivers that are different

from those in the executive order and the Board's proposed rules. Given the level of activity in the legislature, the changed criteria, and the request for additional opportunity to comment, the Board deems it best to terminate its initial rule making and initiate a new one with a redrafted proposed rule. Since the Board already has a fully functioning waiver rule, the delay should not present a problem.

Pursuant to the authority of Iowa Code § 17A.4(1)"b" (1999), the Board terminates the rule making initiated by Board order on January 18, 2000, and published as ARC 9664A..

The Board is hereby initiating a new waiver rule making, also identified as Docket No. RMU-00-1, In Re: Rule Waivers. Pursuant to Iowa Code sections 17A.4, 474.5, 476.1, and 476.2(1), and House File 2206, the Utilities Board gives notice that on July 31, 2000, the Board issued an order in Docket No. RMU-00-1 proposing to rescind current 199—1.3 (17A, 474) and replace it with a new rule 199—1.3 (17A, 474, 476). The Board is also proposing to add a new subrule 2.2(17).

The Board's proposed new waiver rule is intended to modify its existing waiver rule by implementation of changes in 2000 Iowa Acts House File 2206 and Executive Order 11, insofar as the executive order conforms to House File 2206.

The Board has a waiver rule which has functioned well for many years. The Board has successfully handled hundreds of waivers between 1988 and 1998. Most waiver requests were granted, and the Board issued some waivers without request when it was appropriate. Therefore, the Board has two goals in this rulemaking: a) to conform its waiver rule to the requirements of the statute; and b) as much as

possible, to ensure that any modifications to the current rule improve it. The Board has tried to make the new rule as simple as possible, both in language and function.

House File 2206 contains criteria that agencies must use when deciding whether or not to grant a waiver request. The Board has included the statutory criteria in its proposed waiver rule with slight simplification of the statutory language. In addition, the Board does not think there is a difference between a “waiver” and a “variance,” and has therefore eliminated the reference to “variance” in the criteria.

Executive Order 11 contains a uniform waiver rule. In addition, the Governor provided a proposed waiver rule to agencies in January 2000. The uniform waiver rule and the proposed rule contain procedures for handling waiver requests and the issuance of waivers. (These rules also contain criteria for evaluating waiver requests that are no longer in effect because they are different from those in House File 2206.) The Board has included parts of these rules in its proposed waiver rules. However, the uniform and proposed rules also contain sections that are not applicable to the Board’s process and are unnecessary. The Board modified the uniform and proposed rules in several respects. The language was simplified wherever possible.

In most cases before the Board, a waiver request will be made in a pleading in an already existing docket. There is normally no separate proceeding regarding the waiver request. For this reason, the Board will already have much of the information it needs to evaluate the request, and it does not need to be restated in the waiver request. In addition, the Board does not need some of the information contained in

the uniform rule to evaluate the request. Therefore, the Board has modified the uniform rule.

The Board recognizes there may be instances where persons requesting a waiver may be unfamiliar with the Board's processes or may wish to initiate a waiver request in a separate proceeding. For this reason, the Board proposes to offer requesters a choice of using the waiver request form in new subrule 199 IAC 2.2(17), or of submitting their request as a part of another pleading, as has been done most often in the past.

When it first proposed a new waiver rule, the Board stated that since the burden of persuasion is always on the petitioner, this did not need to be stated in the rule. In commenting on the Board's original proposed rule, the Iowa Association of Municipal Utilities stated it would strengthen the rule to include a statement regarding the burden of persuasion. The statute states that the burden is on the petitioner, so repetition in the rule is not required. However, to make it clear to petitioners who may not have the statutory language in front of them, the Board has decided to include that the requester has the burden of persuasion in the rule.

Paragraphs II.D and II.E of the uniform rule in Executive Order 11 that provide for waivers in other contexts are not needed and have not been included.

The procedural requirements have also been modified to reflect that notice of any waiver request or order granting or denying a waiver request will have already been given to other parties in the docket. The Board has the inherent authority to request additional information and this does not need to be stated in the rule. In addition, the Board publishes a weekly list of all orders issued by the Board and all filings made

by parties. This list is provided to subscribers, including utility companies, Consumer Advocate, and others who have requested it. The list is also published on the Board's web site. Therefore, anyone who wishes to know whether any waiver requests have been filed or any orders granting or denying a waiver request issued may obtain the information easily and quickly. The Board has not had problems in the past with implementation of its waiver rule.

The uniform rule requires orders granting waivers to describe the precise scope and operative period of the waiver. The statute states that waivers shall not be permanent unless the petitioner shows a temporary waiver is impractical. These requirements are included in the Board's proposed rule. The remainder of paragraph III.E of the uniform rule and the procedural requirements in the Governor's proposed rule are not needed, as waiver requests are always granted or denied by written Board order, and there has not been a problem with timeliness of issuance. Notice requirements are not needed, because Board orders are always sent to the petitioner and all other parties in the docket.

The Board will comply with the requirement in House File 2206 and 17A.3 that grants and denials of waiver requests will be indexed, filed, and available for public inspection, but it is not necessary that this be stated in the rule. Paragraphs III.H and III.I of the uniform rule, and similar statements in the statute, do not need to be restated in the rule.

The Board simplified the language in the Governor's proposed rule regarding termination of waivers, but did include the provision that the Board may cancel a waiver upon notice and an opportunity for hearing. The Board does not believe

appeals from waiver requests should be handled differently from appeals from any other Board order, particularly since rulings on waiver requests may be contained within a Board order on another topic. Therefore, no specific statement regarding appeals is included in the Board's proposed rule.

House File 2206 states that the agency may place any condition on a waiver that the agency finds desirable to protect the public health, safety, and welfare. While some of the Board's rules protect the public safety, and some in a broad sense protect the public welfare, the Board thinks there is a clearer way to state what is meant by the statute. Therefore, the Board has included the provision that it may condition the grant of a waiver on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question.

The Board has reviewed all comments made on its initial proposed waiver rule. The comments on the proposed rules were generally favorable and supported the Board's statement that it has had a well-functioning waiver rule in place for many years.

MidAmerican Energy Company (MidAmerican) suggested a "public interest" standard be applied to waiver requests. At the time it made the suggestion, there were no mandatory statutory criteria for evaluation of requests. House File 2206 contains the criteria agencies must use when evaluating waiver requests, and the Board's proposed rule contains those criteria. MidAmerican suggested the Board amend its rules to incorporate precedent developed through waivers to eliminate the need for waiver requests when possible. It also suggested the Board amend its rules to eliminate obsolete requirements. The Board has initiated a comprehensive

review of its rules pursuant to Executive Order 8, and those suggestions are being followed in the review. MidAmerican further suggested a method should be established to index waiver requests. House File 2206 requires agencies to index grants and denials of waiver requests, and this will be implemented by the Board.

Consumer Advocate and the Iowa Association of Municipal Utilities (IAMU) commented that the Board should clarify its proposed rule to make it clear waivers would not be granted unless the criteria are met. This has been done. Consumer Advocate also requested the Board include a provision that requests for waivers and orders granting or denying waivers contain a statement of the relevant facts and reasons. Since waiver requests are frequently included in another pleading in an already existing docket, the Board may already have the information. However, to the extent this is not the case, a provision requiring the information has been added. A provision that orders granting or denying waiver requests include facts and reasons for the decision has also been added.

The IAMU suggested the Board include a provision that the person requesting the waiver has the burden of persuasion. For the reasons discussed above, the Board has added this to the proposed rule.

Pursuant to Iowa Code sections 17A.4(1)"a" and "b," any interested person may file a written statement of position pertaining to the proposed amendments. The statement must be filed on or before September 12, 2000, by filing an original and ten copies in a form substantially complying with 199 IAC 2.2(2). All written statements should clearly state the author's name and address and should make specific reference to this docket. All communications should be directed to the

Executive Secretary, Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.

If requested pursuant to Iowa Code section 17A.4(1)"b," or on its own motion after reviewing the statements, the Board will determine whether an opportunity for oral presentation should be provided.

These rules are intended to implement Iowa Code chapters 17A, 474, and 476, and 2000 Iowa Acts House File 2206.

The following amendments to the rules are proposed.

Item 1. Rescind 199—1.3 (17A, 474) and adopt the following **new** rule in lieu thereof:

199—1.3(17A,474,476, H.F. 2206) Waivers. In response to a request, or on its own motion, the board may grant a waiver from a rule adopted by the board, in whole or in part, as applied to a specific set of circumstances, if the board finds, based on clear and convincing evidence, that:

1. The application of the rule would pose an undue hardship on the person for whom the waiver is requested;
2. The waiver would not prejudice the substantial legal rights of any person;
3. The provisions of the rule subject to a petition for waiver are not specifically mandated by statute or another provision of law; and
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule for which the waiver is requested.

The burden of persuasion rests with the person who petitions the board for the waiver. If the above criteria are met, a waiver may be granted at the discretion of the board upon consideration of all relevant factors.

Persons requesting a waiver may use the form provided in 199—subrule 2.2(17), or may submit their request as a part of another pleading. The waiver request must state the relevant facts and reasons the requester believes will justify the waiver, if they have not already been provided to the board in another pleading. The waiver request must also state the scope and operative period of the requested waiver. If the request is for a permanent waiver, the requestor must state reasons why a temporary waiver would be impractical.

The waiver shall describe its precise scope and operative period. Grants or denials of waiver requests shall contain a statement of the facts and reasons upon which the decision is based. The board may condition the grant of the waiver on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question. The board may at any time cancel a waiver upon appropriate notice and opportunity for hearing.

This rule is intended to implement Iowa Code chapters 17A, 474, and 476, and 2000 Iowa Acts House File 2206.

Item 2. Amend 199—2.2(17A, 474) by adopting the following **new** subrule:

2.2(17) *Waiver request.*

STATE OF IOWA
BEFORE THE IOWA UTILITIES BOARD

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(insert case title)

DOCKET NO. (insert docket no.)

WAIVER REQUEST

COMES NOW (insert name of person requesting the waiver), and files this request for a waiver, and in support states:

1. (Insert the specific waiver requested, including a citation to the specific rule the requester wants to be waived, and the precise scope and operative period of the requested waiver. If the request is for a permanent waiver, state the reasons why a temporary waiver would be impractical.)

2. (Insert the relevant facts and reasons that show each of the following: a) the application of the rule would pose an undue hardship on the person for whom the waiver is requested; b) the waiver would not prejudice the substantial legal rights of any person; c) the provisions of the rule subject to a petition for waiver are not specifically mandated by statute or another provision of law; and d) substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule for which the waiver is requested.)

3. (Insert the persons who may be adversely impacted by the grant of the waiver, if known.)

WHEREFORE, (insert name of requester) prays the board grant the request for a waiver of the rule specified above.

Respectfully submitted,

(Signature of requester)
(Name)
(Address and ZIP code)

July 31, 2000
/s/ Allan T. Thoms
Allan T. Thoms
Chairperson